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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 600

FLORIDA DEHYDRATION COMPANY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

LLEWELLYN A. LUCE,
Counsel for Petitioner.

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FLORIDA DEHYDRATION COMPANY, A CORPORATION,
Petitioner,

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THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

Petition

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on December 4, 1951 (R. 15), based on an opinion of the Court of Claims (R. 10).

Statement

The facts alleged in the petition in the Court of Claims (R. 1) are briefly as follows:

The petitioner corporation, in the years 1943 through 1945, made contracts with Government agencies, to furnish dehydrated vegetables (R. 1). Petitioner performed these

contracts, and suffered a total loss in so doing of $260,-846.20, all suffered prior to August 14, 1945 (R. 2, 3). Said losses were suffered by petitioner through no fault of petitioner, but because of facts and events beyond petitioner's control (R. 3-6).

On February 3, 1947, petitioner filed with the proper Government department a claim for said loss of $260,846.20 (R. 4).

On March 5, 1947, said Government department wrote a letter to petitioner's counsel, advising that said claim could not be considered (Exhibit B to Petition, R. 8), because written request for relief was not filed on or before August 14, 1945, or, final action on some contracts had been taken on or before August 14, 1945.

Petitioner claimed and sues under the provisions of the Lucas Act, Act of August 7, 1946 (60 Stat. 902, Ch. 864; P. L. 657), as amended by the 80th Congress, Second Session, effective September 1, 1948 (62 Stat. 869; New Judicial Code, Section 37), to recover said losses of $260,846.20 (App. 15-19).

Petitioner made various written requests for relief, prior to August 14, 1945 (R. 5).

Petitioner alleged that the refusal of the Government to consider the claim was unjust, illegal and erroneous, and sought judgment in the amount of the same (R. 5).

Petitioner's suit was filed September 29, 1948 (R. 1).

Section 6 of the Lucas Act, as amended (App. 15-18) established a Statute of Limitations as to suits such as petitioner's, of six months after action of the Government in either granting or denying the claim.

However, the answer of the defendant to plaintiff's brief in the Court of Claims, filed November 8, 1948, was simply a General Traverse, denying all allegations of the petition (R. 9).

Under Rule 15(b) of the Rules of the Court of Claims (App. 18) a defense of the Statute of Limitations is an affirmative defense, which must be pleaded by the defendant affirmatively. No such defense was pleaded by the defendant.

In this state of the pleadings, Commissioner Hogenson, for the Court of Claims, held a pre-trial conference with counsel for the parties, and made a memorandum of documentary evidence received in the case (R. 17).

One of these documents (Defendant's Exhibit 1, R. 19) is a letter, dated March 31, 1947, from Llewellyn A. Luce, counsel for petitioner, to Secretary of Agriculture, noting refusal of the claim, but requesting conference as to the same. Said letter bears written notations of the representatives of the Department of Agriculture, at the bottom thereof, as follows:

> Phone—called 4-7-47
>
> Mr. Luce will call me back
> first of next week would
> like to discuss
>
> D J S
>
> 4-5-48
> will call back
> and arrange
>
> conference

At this point in the proceeding, before the taking of any testimony, the defendant moved for summary judgment, under Rule 51 of the Rules of the Court of Claims (App. 18), on the ground that no genuine issue as to any material fact was presented, and that the defendant was entitled to judgment as a matter of law (R. 9).

The Court of Claims granted the defendant's motion for summary judgment, on the ground that the six months Stat-

ute of Limitations (Section 6, Lucas Act; App. 17) barred the claim. The opinion of the Court of Claims (R. 10) made its own construction of the notations on defendant's Exhibit 1 (R. 14), without any evidence to explain them having been taken. The Court of Claims further assumed that such notiations were the only evidence to explain them having (which would keep the matter of the claim open, despite a previous denial of the claim), even though (1) the defendant had not pleaded the Statute of Limitations, (2) the plaintiff had not had an opportunity to plead in avoidance of an affirmative plea of the Statute of Limitations, and (3) nothing but incidental evidence had been received with reference to the question of the Statute of Limitations.

Question Presented

There is only one question presented, as follows:

Where the petition of the claimant states a cause of action; and, the defendant answers by general denial, without any plea of the affirmative defense of the Statute of Limitations; and, the defendant moves for summary judgment, before any issue as to the Statute of Limitations has been made in the case, and before evidence on such an issue has been taken: is it not a denial of the procedural due process guaranteed by the Fifth Amendment to the Constitution of the United States for the Court of Claims to grant summary judgment for the defendant upon a defense which the defendant did not plead, as to which there is no issue made, and as to which hearing has not been had nor evidence taken?

Reasons for Granting the Writ

Rule 51 of the Rules of the Court of Claims, being the rule as to summary judgment, is a new Rule of the Court of Claims, having been adopted as of May 15, 1951. Probably

through unfamiliarity with the tremendous power inhering in such a rule, the Court of Claims has turned the claimant out of court with no fair or reasonable opportunity to meet, plead to or deal with the unpleaded and undisclosed ground upon which the Court decided the summary judgment motion. No opportunity was afforded the claimant to plead in avoidance of the affirmative defense of the Statute of Limitations, because such defense was not pleaded. No evidence was taken as to such a defense, because there was no issue made as to the Statute of Limitations. The Commissioner's pre-trial conference was in no sense any kind of a hearing, as to the unpleaded defense of the Statute of Limitations nor as to matters relating to avoidance of such defense. The documentary evidence admitted as a result of the Commissioner's pre-trial conference bears only an oblique, incidental and incomplete relationship to such undisclosed matter. The result of the procedure followed was to turn the claimant out of court with no fair or reasonable opportunity for a hearing and presentation of evidence as to the facts relating to the question of the Statute of Limitations. This constitutes a clear denial of procedural due process. It is such a sharp departure from the accepted and usual course of judicial proceedings as to cry out for the exercise of this Court's power of supervision.

The question of the proper scope of new Rule 51 of the Rules of the Court of Claims is an important Federal question, for this rule as to summary judgment will be called into play with increasing frequency in that Court. So far as the writer knows, this Court has never settled the question of the proper scope of such a summary judgment rule, with reference to constitutional limitations as to procedural due process. Settlement of this important question by this Court would serve as a guide for the Court of Claims, as well as for other courts.

Conclusion

WHEREFORE, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

LLEWELLYN A. LUCE,
Munsey Building,
Washington, D. C.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Claims (R. 10) is reported in Court of Claims; 101 Fed. Supp. 361.

Jurisdiction

The judgment of the Court of Claims was entered December 4, 1951. (R. 15). Jurisdiction is conferred on this Court by Section 1255, Title 28, United States Code (43 Stat. 936, 939, as amended by 53 Stat. 752).

Statement

The essential facts are stated in the preceding petition (pages 1-4).

Question Presented

The question presented is stated in the preceding petition (page 4).

Specification of Error to Be Urged

The Court of Claims erred by granting summary judgment to the defendant on the defense of the Statute of Limitations, inasmuch as (1) the defendant had not pleaded such defense, (2) no issue as to the Statute of Limitations was made by the pleadings in the case, and (3) the plaintiff never had any opportunity to plead, have a hearing, or present evidence as to such an issue or defense. Such error constituted a denial of procedural due process of law.

ARGUMENT

Certiorari Should Be Granted

If the defendant wished to defend on the ground of the Statute of Limitations, it owed the duty to the plaintiff to plead the Statute of Limitations in its answer, as an affirma-

tive defense. This is the clear provision of Rule 15(b) of the Rules of the Court of Claims (App. 18). Had the defendant pleaded the Statute of Limitations, then the plaintiff would have been in a position to plead and prove facts to show that such defense was not legally valid.

The Federal District Court for Louisiana, in *Ernest N. Loeb Co.* v. *Avoyelles Drainage Dist., etc.*, 60 Fed. Supp. 296 (1945), stated the rule applicable with reference to a defense of the Statute of Limitations, as follows (page 301):

> "Prescription is a defense which must be pleaded and as to which there must be a hearing, since the defense may be waived. White v. Davis, 169 La. 101, 124 So. 186."

The lack of a plea of the Statute of Limitations by the defendant, followed by a motion for summary judgment, and the granting of said motion by the Court upon the ground that the Statute of Limitations barred the suit, had the effect of depriving the plaintiff of any opportunity to present its facts relating to the Statute of Limitations. The Court of Claims stated the rule applicable accurately enough, that "the Statute of Limitations is in this case an affirmative defense which might have been overcome by plaintiff's presentation of appropriate facts showing, for example, further negotiations." (R. 14). What the Court of Claims completely overlooked was that no such defense had been pleaded, and that the procedure sanctioned by the Court completely deprived the plaintiff of any opportunity for a hearing, to present its evidence to overcome such a defense. This constituted a denial of procedural due process.

Speaking of procedural due process, the United States Supreme Court, in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451 (1930), by Mr. Justice Brandeis, spoke in part as follows (page 681):

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had *an opportunity to present its case* and be heard in its support." (Emphasis added)

The lack of due process involved in the granting of judgment for a litigant upon an issue or ground not presented by the pleadings is pointed up by the following authorities:

Castle v. *Persons,* 117 Fed. 835, Circuit Court of Appeals, 8th Circuit, 1902, was a suit by Maria Persons, widow of Thomas Persons, deceased, against the plaintiff's son, Phineas Persons. The complaint alleged that Thomas Persons, being very ill, directed his son Phineas to pay $5,000.00, which Phineas owed to his father, to Maria Persons, mother of Phineas; further, that Phineas agreed to do this. The answer by Phineas was a general denial of all of the averments of the complaint. At the trial, the presiding judge developed, by questions, that Thomas Persons had recovered from the illness during which he made the alleged assignment of the debt. On motion of the defendant, the court directed a verdict for the defendant. Upon appeal by the plaintiff to the Circuit Court of Appeals for the Eighth Circuit, that court reversed. Sanborn, Circuit Judge, in his opinion concurring with the reversal by a majority of the court, spoke in part as follows (pages 842-843):

> "In my opinion no question of donatio mortis causa was presented in this case, and no judgment against the plaintiff ought to be sustained on the ground that the novation which Maria Persons pleaded was void because it was made in contemplation of the death of her husband, Thomas Persons, for the reason that no such defense was pleaded and no such issue was presented for trial when the case came on for hearing, or was ever fairly tried. The averment of the complaint was that Thomas Persons assigned his claim for $5,000

against Phineas P. Persons to Maria Persons, that he directed Phineas to pay this debt to Maria, and that Phineas agreed to do so. The answer was a flat denial of these averments, and nothing more. The defense which was interposed by the court near the close of the plaintiff's evidence and which was sustained at the trial, was a confession and avoidance which had not been pleaded, and of which the plaintiff had received no notice until after the issues made by the pleadings had been practically tried. * * *

"That due process of law without which parties may not be deprived of their property gives to them an opportunity to be heard respecting the justice of the judgment sought. It gives notice of the issue to be determined before it is tried. One may not bring suit upon one cause of action and recover upon another, nor may he go to trial upon one defense and sustain a judgment in his favor upon another and inconsistent defense. He may not deny in his answer the plaintiff's averments of a good cause of action, and then defeat him by a confession of the truth of those averments, and an avoidance of their effect by the proof of new matter no notice of which was given by the pleadings or by the course of the trial until the plaintiff had introduced substantially all his evidence. Proofs without averments and averments without proofs are equally unavailing. Gentry v. U. S., 41 C. C. A. 185, 101 Fed. 51; Burton v. Platter, 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. Fed. 901, 905; Taussig's Ex'rs v. Glenn, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; Merrill v. Rokes, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452; Live Stock Co. vs. Blackburn, 30 U. S. App. 571, 579, 17 C. C. A. 532, 536, 70 Fed. 949, 954; Wood v. Collins, 23 U. S. App. 224, 230, 8 C. C A. 522, 525, 60 Fed. 139, 142."

Morgan v. *United States*, 304 U. S. 1, 58 S. Ct. 773 (1938), involved the question of the validity of the procedure of the Secretary of Agriculture in fixing stockyards maximum

rates. In the proceeding, the claims and the position of the Government had never been definitively stated. In holding that the procedure followed was in violation of due process, the United States Supreme Court, by Mr. Chief Justice Hughes, spoke in part as follows (pages 776, 777):

> "Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature.
>
> • • • • • • •
>
> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

In *Boyle* v. *Public Adjustment & Construction Co.*, 87 Ohio App. 264, 93 N. E. 2d 795, Court of Appeals of Ohio, 1950, Boyle, Treasurer of an Ohio county, brought suit to foreclose a tax lien. The defendants attempted to eliminate this suit, by making payments to the County Treasurer, under the authority of the Ohio Whittemore Act. The County Treasurer accepted these monies, but proceeded with his litigation. Ultimately, the Supreme Court of Ohio affirmed foreclosure of the tax lien, holding that the Ohio Whittemore Act had no application. There was no pleading or counterclaim, by the taxpayers, for restitution to them of the sums of money that they had paid to the County Treasurer. Nevertheless, the trial court in Ohio made an order, in the nature of a judgment, that the defendant taxpayers have and recover said sums of money from the plaintiff County Treasurer. Upon appeal by the County Treas-

urer to the Court of Appeals of Ohio, that court reversed, speaking in part as follows (pages 798-799):

> "No pleading of any sort has been filed at any time alleging a cause of action based on the payment and praying for judgment on such cause of action. There was and is nothing on file to which the Treasurer could demur or plead. No such issue has ever been made. The question is, whether under such circumstances the court had jurisdiction to make the order appealed from, which in fact and law purports to be a judgment for money against the Treasurer. We are of the opinion that the Court lacked such jurisdiction. * * *
>
> "In I Freeman on Judgments, 5th Ed. at pages 677 and 678 it is said:
>
> " 'But it is not enough that the court's power may be found broad enough in the abstract to cover the class of litigation to which the case in question belongs. Mere possession of power to act in respect to a specific subject matter is of no consequence unless that power is properly invoked. For jurisdiction of the subject matter of a particular case is something more than the constitutional or statutory power to entertain cases of the general class to which the one in hand belongs; it is that power called into activity, not by the court of its own motion for that would ordinarily be insufficient, but by some act of the suitor concerned and in some mode recognized by law.
>
> " 'A court has no power to render judgment in favor of one as plaintiff if he has never commenced any action or proceeding calling for its action, nor has it, as a general rule, power to give judgment respecting *a matter not submitted to it for decision*, though such judgment is pronounced in an action involving other matters which have been submitted to it for decision and over which it has jurisdiction. There must be some appropriate application invoking the judicial power of the court in respect to the matter sought to be litigated, such as the filing of a petition, complaint or other proper pleading, for it is in this manner that the court's

power over the subject matter is invoked.' (Emphasis added.)

"And at pages 737, 738 and 739: 'In some instances courts have undertaken to decide questions not involved in the suit or action before them and to grant relief therein; and their judgments have been assailed for that reason, and to the extent to which they departed from the matters embraced within the record they have been denied effect. A court is limited in its determination to the matters properly before it. Ordinarily it has no authority to pass upon questions not involved and in respect to which its jurisdiction has not been invoked. For courts cannot ex mero motu set themselves in motion nor have they power to decide questions *except such as are presented by the parties in their pleadings.* What is decided within the issues is coram judice; anything beyond is void, unless the parties voluntarily try an issue outside the pleadings. *A judgment outside the issues is not a mere irregularity, but is extrajudicial and invalid.*' (Emphasis added.)

* * *

"No matter how it is considered, the action of the court was beyond its jurisdiction upon the state of the record. To conclude, the county treasurer under such circumstances would be lacking in due process of law."

Conclusion

This Court has always acted as guardian and supreme arbiter of procedural due process, with reference to the rights of an accused in a criminal case. Intervention by this Court to preserve and safeguard procedural due process, in such cases, has substantially guaranteed complete procedural fairness and due process in those cases. The procedural due process which the plaintiff seeks, in the case at bar, is in its way equally important. This Court has not yet given its authoritative pronouncement as to this class of cases. The question is important. If a Federal Court of the

high standing and great ability of the United States Court of Claims errs in this way, denying procedural due process through a misapplication of its summary judgment rule (Rule 51; App. 18), the danger of similar error by other courts is clear.

Petitioner respectfully submits that the writ of certiorari should be granted.

Respectfully submitted,

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Washington, D. C.,
Counsel for Petitioner.

APPENDIX

The Lucas Act

Public Law 657—79th Congress,
Chapter 864—2d Session
60 Stat. 902

AN ACT

To authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contract during the war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U. S. C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the head of the department or agency concerned or by a central authority therein designated by such head.

Sec. 2(a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, sup-

plies, or services were furnished for the Government between September 16, 1950, and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. Wherever a department or agency considering a claim under this Act finds that losses under any such contract or subcontract affected the computation of the amount of excessive profits determined in a renegotiation agreement or order, and to the extent that the department or agency finds such amount was thereby reduced, claims for such losses shall not be allowed under this Act.

(b) Every claimant under this Act shall furnish to the department or agency concerned any evidence within the possession of such claimant bearing upon the matters referred to in subsection (a) of this section.

Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

Sec. 4. Appropriations or funds available for work, supplies or services of the character involved in the respective claims at the time of settlement thereof shall be available for payment of the settlements: *Provided,* That where no such appropriations are available, appropriations for payment of such settlements are hereby authorized.

Sec. 5. Each department and agency shall report to the Congress quarterly the name of each claimant to whom relief has been granted under this Act, together with the amount of such relief and a brief statement of the facts and the administrative decision.

Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision of the court as in other equity cases.

Approved August 7, 1946.

Amendment of The Lucas Act

Public Law 773—80th Congress
Chapter 646—2d Session

AN ACT

To revise, codify and enact into law Title 28 of the United States Code entitled "Judicial Code and Judiciary"

Sec. 37. Section 6 of the Act approved August 7, 1946 ch. 864, 60 Stat. 902), is amended to read as follows:

"Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims or, if the claim does not exceed $10,000 in amount or suit has heretofore been brought or is brought within thirty days after the enactment of this amendatory Act, with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to

which said claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court under this section may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory Act, be transferred to the Court of Claims for original disposition in that court."

Sec. 38. The provisions of this Act shall take effect on September 1, 1948.

Rule 15(b) of the Court of Claims

Affirmative Defenses: In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, *statute of limitations,* waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the Court may, if justice so requires, treat the pleading as if there had been a proper designation. (Emphasis added.)

Rule 51(c) of the Court of Claims

Motion and Proceedings Thereon: After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7(b) for filing a response thereto, such motion shall be assigned to the calendar, as provided in Rule 47(b). The judgment sought shall be rendered if the pleading, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 600

FLORIDA DEHYDRATION COMPANY, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 10-15) is reported at 101 F. Supp. 361.

JURISDICTION

The judgment of the Court of Claims was entered on December 4, 1951 (R. 15). The petition for a writ of certiorari was filed on February 20, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, after failing even to suggest, by opposing affidavits or otherwise, in its response to respondent's motion for summary judgment that a genuine issue as to a material fact did exist, petitioner can now contend that such an issue does exist and that it was error for the Court of Claims to grant the motion.

RULES OF THE COURT OF CLAIMS INVOLVED

The Rules of the Court of Claims provide in pertinent part as follows:

> 15(b). Affirmative Defenses: In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. * * *
>
> 16(b). How Presented: Every defense in law or fact, to a claim for relief in any pleading, whether a petition, counterclaim, or third-party petition, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction of the subject matter or the person, and (2) failure to state a claim upon which relief can be granted. * * *

16(h). Waiver of Defenses: A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply * * * except (2) that, whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

51(c). Motion and Proceedings Thereon: After a motion for summary judgment has been filed and served as provided in Rules 3 and 7 and after expiration of the time allowed by Rule 7(b) for filing a response thereto, such motion shall be assigned to the calendar, as provided in Rule 47(b). The judgment sought shall be rendered if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

STATEMENT

On September 29, 1948, petitioner instituted the present suit in the Court of Claims for equitable relief under the Lucas Act (Act of August 7, 1946, 60 Stat. 902). In its petition, petitioner alleged that during the years 1943, 1944, and 1945, it entered into a series of contracts with respondent, through the War Foods Administration and the

Department of Agriculture, for the furnishing of various dehydrated vegetables, and that, in the performance of those contracts, it suffered a total loss of $260,846.20 through no fault of its own (R. 1-4). Petitioner further alleged that, on February 3, 1947, it filed a claim with the Department of Agriculture under the Lucas Act (R. 4), and that, on March 5, 1947, the Department of Agriculture mailed a letter to petitioner's attorney advising him that the claim could not be considered (R. 4). The letter stated that "any claim for losses incurred under these contracts cannot be considered under Public Law 657 [Lucas Act] because of failure to comply with Section 204 of Executive Order 9786, either for the reason that a written request for relief was not filed on or before August 14, 1945, or that final action with respect thereto was taken on or before that date." (R. 9).[1]

In answer to these allegations, respondent filed a general traverse (R. 9). Subsequently, a pretrial conference was held before a Commissioner and documentary evidence was received (R. 17-19). One of those documents is a letter, dated March 31, 1947, from petitioner's attorney to the

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[1] Section 204 of Executive Order 9786 (11 F.R. 11553, 3 CFR Supp. 1946, p. 165) provides that "No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date." See *Fogarty* v. *United States*, 340 U.S. 8.

Secretary of Agriculture acknowledging receipt of the denial of petitioner's claim and requesting a conference (R. 19). At the bottom of this letter are two notations made by someone in the Department of Agriculture. One notation is to the effect that petitioner's attorney had called the Department on April 7, 1947, and would call back the following week to discuss the claim. The second notation is that on April 5, 1948, a year later, petitioner's attorney had called and would call back and arrange a conference. (R. 12-13.)

On the basis of the petition and the documents introduced into evidence, respondent moved for summary judgment (R. 9-10). In support of its motion, respondent urged (1) that the letters referred to in paragraph VIII of the petition (R. 5) did not constitute requests for relief within the meaning of the Lucas Act prior to August 14, 1945, and (2) that petitioner's claim was barred by the six months' period of limitation provided for in Section 6 of the Lucas Act.[2] Petitioner filed no

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[2] Section 6 of the Lucas Act (Act of August 7, 1946, 60 Stat. 902), as amended by Section 37 of the Act of June 25, 1948, 62 Stat. 869, 992, provides in pertinent part as follows: "Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed $10,000 in amount or suit has heretofore been brought or is brought within thirty days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim * * *."

opposing affidavits and made no suggestion in its response to the motion that there existed any genuine issue as to any material fact. In its response, petitioner argued only (1) that its letters to the Department of Agriculture prior to August 14, 1945, did constitute written requests for relief within the meaning of the Lucas Act, and (2) that the letter of March 5, 1947, from the Department of Agriculture to petitioner's attorney did not finally dispose of petitioner's claim because the two notations on the letter of March 31, 1947, demonstrate that the claim was still pending and was being considered within the six months preceding the date of the filing of suit.

On these admitted facts, the Court of Claims held that petitioner's claim was formally denied on March 5, 1947, was not the subject of subsequent formal negotiations, and is, therefore, barred by the six months' period of limitation provided for in Section 6 of the Lucas Act. The court accordingly did not reach the question whether petitioner had filed requests for relief under the Lucas Act with the Department of Agriculture prior to August 14, 1945.

ARGUMENT

Petitioner apparently concedes that, on the facts before this Court, the Court of Claims correctly held that petitioner's claim is barred by the six months' period of limitation provided for in Section 6 of the Lucas Act (*supra,* p. 5, n. 2).

Petitioner now contends, however, that to have made that determination on motion for summary judgment on the basis of the present record was to deny petitioner procedural due process, allegedly because no issue as to the statute of limitations was raised by the pleadings and petitioner was consequently not afforded an opportunity to plead and present facts to defeat that defense, *i.e.*, evidence to explain the notations on the letter of March 31, 1947 (*supra*, p. 5) (Pet. pp. 4, 7). Neither contention, we submit, has any validity.

Both facets of petitioner's argument rest upon the proposition that the Rules of the Court of Claims permit the defense of limitations to be raised only by answer. In support of its position, petitioner points to Rule 15(b) which states that "In pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations * * * and any other matter constituting an avoidance or affirmative defense."[3] But petitioner overlooks Rule 16(b) which provides that the de-

[3] It should be pointed out that, at the time respondent filed its general traverse (R. 9), the court's Rules did not provide that a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense. At that time (November 8, 1948), Rule 19 stated only that "The defendant shall file a printed demurrer, plea, or answer within 40 days after the filing of any petition, unless the court, for cause shown, extends the time." See 11A U.S. Sup. Ct. Digest (1949 ed.) p. 435. The present Rule 15 was promulgated on May 15, 1951, more than two years after the general traverse was filed.

fense of "lack of jurisdiction of the subject matter or the person" "may at the option of the pleader be made by motion," and Rule 16(h) which provides with respect to waiver of defenses that "whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the court shall dismiss the action." Since statutes of limitations relating to claims of which the Court of Claims may take cognizance are not merely procedural but are also jurisdictional in nature,[4] respondent plainly did not waive that defense by raising it for the first time on motion for summary judgment. Indeed, as this Court announced in *Finn* v. *United States*, 123 U.S. 227, 232-233, "The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims."

In any event, it cannot properly be contended

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[4] *Finn* v. *United States*, 123 U.S. 227; *United States* v. *Wardwell*, 172 U.S. 48, 52; *Munro* v. *United States*, 303 U.S. 36, 41.

that petitioner was prejudiced by the fact that the question of limitations was first raised on motion for summary judgment. If, as petitioner now suggests, there was a genuine issue as to any material fact, petitioner could have responded to the motion and shown by opposing affidavits that such an issue of fact existed. Although petitioner was afforded the opportunity to do so under Rule 51(c), it did not make such a showing before the court below, but argued only that, on the pleadings and documents in evidence, its claim had been timely filed as a matter of law. In the circumstances, petitioner can scarcely be heard now to complain that it was deprived of any opportunity to present the pertinent facts and that a genuine issue of material fact does exist.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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